

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**In re: Santa Fe Natural Tobacco Company
Marketing, Sales Practices, and Products
Liability Litigation**

No. 1:16-md-2695-JB-LF

*This Motion Relates to All Actions,
and Is Brought by All Defendants*

**DEFENDANTS' SECOND MOTION FOR JUDICIAL NOTICE IN SUPPORT OF
THE MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT**

In accordance with Federal Rule of Evidence 201, and in connection with the concurrently filed Motion to Dismiss, Defendants Santa Fe Natural Tobacco Company, Inc. ("Santa Fe"), Reynolds American Inc. ("RAI"), and R.J. Reynolds Tobacco Company respectfully request that the Court take judicial notice of the Memorandum of Agreement Between FDA Center for Tobacco Products and RAI Services Co. / Santa Fe Nat. Tobacco Co. (Jan. 19, 2017), a true and correct copy of which is attached hereto as Exhibit 1.

The parties conferred in good faith before the filing of this motion but were unable to resolve their differences, necessitating this filing.

ARGUMENT

Plaintiffs' Consolidated Amended Complaint ("CAC") centers on the marketing, advertising, and packaging of Santa Fe's Natural American Spirit ("NAS") cigarettes. In their motion to dismiss the CAC, Defendants rely on, among other things, a Memorandum of Agreement between Santa Fe and the Food and Drug Administration's Center for Tobacco Products (Ex. 1). Under that agreement, Santa Fe agreed to cease using the terms "Natural" and "Additive-Free" in "all Natural American Spirit cigarette product labels, labeling, advertising, and promotional materials." Memo.

of Agreement at ¶¶ 1, 2. Because this is the very conduct that Plaintiffs seek to enjoin, the information contained in the Memorandum of Agreement is central to Defendants' argument that Plaintiffs' claims for injunctive relief are now moot. *See* Defs.' Mot. to Dismiss at VI.

Federal Rule of Evidence 201(b) authorizes courts to take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see also Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1298 n.2 (10th Cir. 2014). And the Court may do so at the motion-to-dismiss stage, as the Tenth Circuit has made clear that "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment." *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

It is appropriate for the Court to take judicial notice of the Memorandum of Agreement, as that document is "a matter of public record." *Van Woudenberg ex rel. Floor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001). In addition, judicial notice is appropriate because the Memorandum of Agreement is an official "government document[]." *Miller v. U.S. Dep't of Interior*, 635 F. Supp. 2d 1224, 1230 (D. Colo. 2009); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 347 F. Supp. 2d 1061, 1067–68 (D. Utah 2004) ("government records"); *Forest Guardians v. U.S. Forest Serv.*, No. 05-0372, 2006 WL 4109660, at *3 (D.N.M. Aug. 15, 2006) ("The Tenth Circuit holds that a reviewing court may take judicial notice of certain government documents" (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n.6 (10th Cir. 1985))).

Consistent with these principles, district courts across the federal judiciary routinely take judicial notice of public records such as consent decrees and official government press releases.¹ And Plaintiffs cannot reasonably dispute the accuracy or authenticity of the attached exhibit.

CONCLUSION

Defendants respectfully request that the Court take judicial notice of the attached Memorandum of Agreement.

¹ See, e.g., *Ctr. for Biological Diversity v. Hagel*, 80 F. Supp. 3d 991, 996 n.3 (N.D. Cal. 2015) (“official Government press releases”); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp.3d 581, 588 n.4 (S.D.N.Y. 2015) (federal government agency press release); *United States ex rel. Modglin v. DJO Global Inc.*, 48 F. Supp. 3d 1362, 1381 (N.D. Cal. 2014) (“public records and government documents available from reliable sources ... such as websites run by governmental agencies”); *Simon v. Smith & Nephew, Inc.*, 990 F. Supp. 2d 395, 401 n.2 (S.D.N.Y. 2013) (“public records contained on the FDA website”); *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1146 n.4 (N.D. Cal. 2003) (EPA consent decree); *Stanifer v. Corin USA Ltd., Inc.*, No. 6:14-cv-1192, 2014 WL 5823319, at *3 (M.D. Fla. 2014) (“public records available on the FDA’s website”).

Dated: February 23, 2017

Respectfully submitted,

/s/ David M. Monde

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R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel or parties of record.

Dated: February 23, 2017

Respectfully submitted,

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